Pancini v Esso International Shipping (Bahamas) Co Ltd & Anor

HIGH COURT (SINGAPORE) — SUIT NO 2333 OF 1982
CHAO HICK TIN J
6 DECEMBER 1990

Contract — Employment agreement — Employee's services terminated due to illness — Claim for benefits under agreement

Tort — Negligence — Whether injury resulted from job — Whether party subject to peculiar risks — Whether employer was negligent in not following doctor's recommendations

Labour Law — Insurance of employee — Seaman engaged under various agreements — Insurance to be taken out by employer — Whether injury suffered covered by insurance — Occupational illnesses — Whether illness peculiar to job — Employer failed to take out group accident insurance policy — Employer thus self-insured

Damages (Personal Injury or Death) — Quantum of damages — Calculation of six years' wages — Differing opinions of experts

Agency — Liability of agent — Employment agreement — Second defendant acting as agent and manager in negotiations with employee — Liability for damages for negligence and benefits under agreement

The plaintiff was engaged at various times by the first defendant under the agreement of engagement signed by the second defendant as agent for the first defendants. In 1980, the plaintiff was in command of a vessel. While he was approaching Port Dickson, he felt giddy and was vomiting and had abdominal pain. He was brought to see a doctor who suggested that he be hospitalized, but the plaintiff did not inform another captain of the first defendant of this. In fact, the plaintiff mentioned that he will take the vessel to Penang. On arrival in Penang, he was admitted to the Penang Medical Centre and was subsequently transferred to Singapore under the charge of one Dr Yap. By the end of 1980, his condition improved and on the recommendation of Dr Yap, the plaintiff was permitted to do light duties on shore for two months before reassignment on a ship after another medical assessment.

In February 1981, the plaintiff sought a reassessment and Dr Yap allowed the plaintiff to return to work on board a ship and recommended that he should work with the assistance of another captain or a first mate for about a month or one round trip in order to ensure that he is able to function in his previous capacity. The first defendant did not follow the recommendation. The plaintiff went on for further other assignments and in November 1981, while navigating through the Singapore Straits, the vessel in which he had command of collided with a beacon. Subsequently, in February 1982, the plaintiff's services were terminated and it was not disputed that his termination was because of the collision. Subsequently, the plaintiff consulted an orthopaedic surgeon who concluded that he could not assume the position of a ship's captain as his locomotor system is badly affected. A neurologist also stated that the function of the plaintiff's right leg remains unsatisfactory mainly due to the severe spasticity which developed since a stroke. From an authority in Italy, the plaintiff was declared permanently disabled for services of navigation. The plaintiff was not aware that he had a stroke which damaged his brain prior to the consultation with the orthopaedic surgeon. The plaintiff now claims against the first defendant for negligence and for benefits rightly due to him under the terms of his engagement.

Held, allowing the plaintiff's claim:

(1) From the evidence tendered in court, it would appear that the plaintiff's condition could have been caused by virus encephalitis brought about by mosquito bites. There is no evidence to suggest that the injuries suffered by the plaintiff were aggravated as a result of his taking the vessel from Port Dickson to Penang. Therefore, the claim on negligence failed.

(2) The illness and accident schemes set up in the exh 'P1' is a scheme which is applicable to the plaintiff when he suffered the injuries in 1980. Clause B(3) concerned occupational illnesses and to qualify as such, it must be shown that the illness is peculiar to the job. There is no evidence presented to show how a heart attack is in any way peculiar to the job of a seaman. Furthermore, the question of whether the plaintiff suffered 'injuries sustained on the job' within the Decree No 1124 was subject to differing opinions, in particular, what constitutes 'external violent cause'. A mosquito bite could constitute an external force, but it must be such a job which exposes the plaintiff to the specific risks of being bitten by mosquitoes. There is no evidence that the plaintiff had gone to a mosquito infected area exposing him to some peculiar risks which the plaintiff would not otherwise be exposed. There is nothing to link the injury to the job.

(3) However, the sickness and accident insurance scheme incorporated by art VIII of the agreement of engagement normally applies to private Italian merchant marine and is of wider scope than the strict Italian law of Decree No 1124. Although the injuries suffered by the plaintiff cannot be considered as being sustained on a job, they could be covered by either cl B(3) or cl B(4) of the scheme and is entitled to compensation described therein.

(4) The plaintiff is entitled to 13 months' pay for 13 years' service as regards retrenchment benefits. On a straight calculation of six years' wages, the claim payable under the insurance would be for 168,176.016 lires.

(5) It is quite clear that at all times, the second defendant was acting as agent for the first defendant and throughout the entire period, the plaintiff was dealing directly with the second defendant, but the fact remains that the second defendant had, at all material times, acted as agent and manager. Therefore, the person liable to the plaintiff is the first defendant and not the second defendant. The claim against the second defendant was accordingly dismissed.

Nathan Isaac (*M Kumar* with him) for the plaintiff.
M Karthigesu (*A Karthigesu* with him) for the defendants.

Cur Adv Vult

Chao Hick Tin J: The plaintiff was an Italian seaman. He was first engaged in Singapore in February 1969 by a predecessor company of the first defendant to serve on board its vessel as a second officer. In 1970, the plaintiff was again engaged, but this time in Italy. In accordance with the standard procedure and practice of the first defendant and its predecessor, an agreement of engagement was entered into whenever the plaintiff was engaged to serve on board a vessel. All subsequent agreements of engagement would appear to have been executed in Singapore.

From 1969 until his services were terminated on 5 February 1982, the plaintiff had signed numerous agreements of engagement. These agreements were signed by the second defendant as agent for the first defendant. The last such agreement was dated 12 November 1981 when the plaintiff signed up to take command of Esso Chawan. Throughout the entire period of service with the first defendant and its predecessor (hereinafter referred to as 'Esso'), the plaintiff's employment was negotiated with and carried out by the second defendant.

The plaintiff has been married to a Singaporean since 1972 and has practically resided here ever since, except for his voyages on board Esso vessels. He was promoted by the second defendant to the rank of captain in 1973 and was given the status of a career master in 1979. The significance of being made a career master was that there would be enhanced benefits, including the payment of wages in between assignments. His wages had always been in Italian lires.

Events leading to the claim

On 27 August 1980 Esso Chawan left Singapore under the command of the plaintiff. On 9 September 1980, as the vessel was approaching Port Dickson (approximately two hours before reaching Port Dickson), he felt giddy and was vomitting and had abdominal pains. His condition was such that he could not even be on the bridge to accompany the port pilot to bring the vessel into port. On docking, the plaintiff was brought by the local agent of Esso to see a doctor who after examining him suggested that he be hospitalized. The next day Capt Arrivo called from Singapore (who must have been informed by the agent at Port Dickson) on the phone to inquire about his condition and the plaintiff, being dedicated to his duty, told Capt Arrivo that he would try to take the vessel on to the next port, Penang. He did not tell Capt Arrivo that the doctor had suggested that he should be hospitalized. He merely told Capt Arrivo of his giddiness and upset stomach. Of course at that point the plaintiff did not know what exactly was wrong with himself and I would say not even the doctor at Port Dickson knew the real cause.

The vessel arrived at Penang on 11 September 1980. The plaintiff was admitted into the Penang Medical Centre. His main complaints to the doctor there were giddiness and some weakness in his upper limbs, particularly on the right side. Another feature was his abnormal laughter. He was still being investigated there when at the insistence of the wife of the plaintiff (who had in the meantime arrived in Penang from Singapore) he was on 12 September 1980 brought back to Singapore for further medical treatment. On returning to Singapore the plaintiff was admitted into Jurong Hospital.

On 14 September 1980 the plaintiff was referred to and was examined by a neurologist, Dr Michael Yap (PW6). On Dr Yap's recommendation the plaintiff was on 15 September 1980 transferred from Jurong Hospital to Mount Elizabeth Hospital. From then until 3 October 1980, the plaintiff was under the care of Dr Yap. The diagnosis of Dr Yap then was that it was likely that the plaintiff had multiple bilateral cerebral emboli.

From 3 October 1980 the plaintiff was convalescing in Jurong Hospital. He was complaining of giddiness and nausea with upper abdominal discomfort. He was otherwise alert, rational and able to walk by himself although slightly unsteady. On 18 November 1980, the plaintiff was certified fit for discharge from hospital for further convalescence at home. At that time his condition had improved, both in terms of motor power and coordination although there was a slight weakness in his right lower limb. He was alert and was conversing sensibly.

On 11 December 1980 the plaintiff returned to Dr Yap for a re-assessment as he was feeling restless at home and wanted to return to work. Dr Yap noted that the plaintiff had made a very remarkable recovery and his mental condition was quite normal. He had minimal right hand paralysis and limped slightly in his right leg. Accordingly, Dr Yap recommended to Dr Catherine Ng, who was the general physician to Esso, that the plaintiff might be permitted to do light duties on shore for two months, at the end of which Dr Yap would see him again before he resumed his previous job as a ship captain.

On 22 January 1981, Dr Catherine Ng put the plaintiff through a treadmill test to assess the plaintiff's cardiac function. No symptoms emerged until stage IV when the plaintiff complained of tired thigh muscle and was unable to continue because of 'dragging of right leg'. Dr Catherine Ng noted that while the plaintiff had recovered gradually from the cerebrovascular accident that occurred in September 1980, there was at that point residual weakness in the right leg.

On 2 February 1981 the plaintiff returned to consult Dr Yap again as he was anxious to get back to sea. Dr Yap, in his report (1PB7) to Dr Catherine Ng dated 10 February 1981, stated that the plaintiff was 'well now' and 'back to his usual self'. He recommended that the plaintiff be allowed to return to work on board a ship. But having considered the responsibilities of a captain of a vessel he added a proviso that 'in view of his recent severe illness from which he has made an excellent recovery, it is best that he should work with the assistance of either another captain or a first-mate with a master's certificate for one month or one round trip ... in order to ensure that he is able to function in his previous capacity'. Dr Yap explained to the court that

he suggested that precautionary measure to test the plaintiff's functions; he was concerned about the plaintiff's ability to make judgment. Dr Yap added that in a sense he was bending backwards to accommodate the plaintiff's desire to go back to sea.

On 12 February 1981 Dr Catherine Ng certified the plaintiff fit for work and added that the recommendation of Dr Yap should be followed. As it turned out, the plaintiff was in March 1981 sent to take charge of Esso Tumasik at Guam. Esso did not follow the recommendation of Dr Yap. The trip took him from Guam to Singapore. Then in April 1981 he was assigned to take command of Esso Jurong, which sailed to Phuket, Rangoon and Bombay. It was alleged that on the way to Bombay, the vessel encountered stormy weather as it was the monsoon season. The plaintiff's wife had to threaten Esso in order to make sure that the plaintiff was sent back to Singapore. He flew back from Bombay on or about 20 August 1981.

On 12 October 1981 the plaintiff went for a pre-employment medical examination by Dr Catherine Ng who certified that the plaintiff was fit for employment. In another report dated 19 October 1981 she made the conclusion that the 'neurological findings are consistent with an old cerebrovascular accident with good functional recovery'.

On 12 November 1981 the plaintiff signed an agreement of engagement for the purpose of again taking command of Esso Chawan. On 4 January 1982, while the vessel was under pilotage and navigating through the Singapore Straits, it collided with a beacon. On 11 January 1982, he was sent to see one Dr Powell at M/s Bain and Partners, who certified that there had been 'no adverse change in Capt Pancini's physical condition since previous examinations by Dr Catherine Ng and Dr Michael Yap'. Dr Powell considered him 'fit to continue with his normal duties'. The plaintiff said that it was only at Bain's clinic that he obtained his whole medical file. On 2 February 1982 the second defendant, on behalf of the first defendant, terminated the plaintiff's contract of employment of 12 November 1981, with effect from 5 February 1982 (1PB22). It is clear that the plaintiff's employment was terminated because of the collision. Mr Teddy Yap (DW2), a port captain in charge of services with the second defendant, said so to the court.

On 5 February 1982, the plaintiff consulted Dr V K Pillay, an orthopaedic surgeon in private practice, to determine his physical condition. In his report (1PB11) dated 8 February 1982, Dr Pillay stated the following conclusion:

> There is no doubt that this patient is what is termed a right hemiplegic. Though he has recovered to a large extent in cerebral function, there is still residual weakness and marked spasticity in both the right upper as well as the right lower limb. The right ankle clonus troubles him when he wants to put his foot on the ground and on some occasions the whole lower limb would go into jactitation. He cannot be passed as medically fit to assume the position of ship's captain for his locomotor system is badly affected ...

On 16 February 1982 the plaintiff went to Dr Loong Si Chin, a consultant neurologist in private practice, who in his medical report (1PB12) stated that:

> Neurological examination on 16 February 1982 showed that he had slight spasticity in his right upper limb (forearm pronators) and mild weakness of his right hand (wrist extension, finger extension and finger abduction). He could write legibly although somewhat slowly. In contrast to his right upper limb, the right lower limb was extremely spastic with clonus at the knee and ankle ...
>
> This patient has a residual right hemiparesis. Recovery in the upper limb can be considered good or even excellent. However, the function of the right leg remains unsatisfactory, due mainly to the severe spasticity which has developed since the stroke ...

On 16 June 1983 the plaintiff went before the Permanent Medical Commission of the Port Master of Imperia, the authority in Italy which was in charge of private merchant marine. The commission, after examination, declared that the plaintiff was 'permanently disabled for the services of navigation'.

On 22 May 1987, the plaintiff went for a re-assessment by Dr VK Pillay who stated in his report (1PB13) that though the plaintiff had shown 'marginal improvement he is still a right hemiplegic with an abnormal gait'. There was still spasticity on the right side especially in the lower limb. Dr Pillay also sent him for a further neurological examination by one Dr Nei I-Ping, who reported that (1PB14):

> Mr Pancini has signs of residual right hemiparesis which are likely to be permanent. He will have difficulty with running and climbing. He has some loss of finger dexterity resulting in difficulty with writing. The degree of partial permanent disability is about 40%. He is unfit to be a ship captain. He may be able to perform a sedentary job which does not require too much writing.

In his evidence in court, the plaintiff said that prior to his seeing Dr Pillay on 5 February 1982 no one told him that he had a stroke or damage to the brain. Dr Pillay informed him that he was a hemiplegic. Prior to that he did not realize how serious his illness was. If he had been told what he had suffered he would not have asked to be sent back to sea.

Bases of the claim

In this action the plaintiff's claim falls broadly under two heads — first, for damages on the ground of negligence on the part of Esso and/or the second defendant; and second, for the benefits which are rightfully due to him under the terms of the agreement of engagement.

As the terms of the agreement of engagement would appear to incorporate some aspects of Italian law, the parties have each called an expert on Italian law to testify on his/its behalf. It may be appropriate for me at this juncture to state that it is clear, having heard the evidence of the two Italian experts, that an Italian seaman is entitled to enter into contracts abroad on terms mutually acceptable to him and a foreign shipowner. There is no question of Italian law applying unless the parties agree that Italian law should apply. The contract signed would govern their relationship (see NE 84: the evidence of the plaintiff's Italian expert).

For a better understanding of the issues, I will now set out the relevant provisions of the agreement of engagement dated 27 August 1980, which was the contract in force when the plaintiff fell ill at Port Dickson.

> Article VIII — Sickness and Accident Insurance — Pensions — Welfare Assistance
>
> The company shall arrange for sickness and accident insurance providing conditions similar to those applying to the private Italian merchant marine.
>
> In the event of sickness or accident during vacation the company must be notified within three (3) days after certification of disability and vacations will be interrupted only if disability exceeds seven (7) consecutive days.
>
> Notification of disability shall be made to the manning agent.
>
> The company will make contribution to the National Pension Fund according to what is provided for the Italian seamen serving onboard vessels flying a foreign flag withholding from wage the employee's share of the contribution.
>
> Article XIII — Documents Required
>
> It is a condition of employment that an employee has certain documents appropriate to his rank.
>
> Therefore an employee called for assignment on board shall carry with him the following documents:
>
> — Italian seamen's book bearing evidence of valid bennal visit by Cassa Marittima, of the professional grade pertinent to rank and, if subject to military service of the permit by port authority to serve on board a foreign flag vessel.
> — Valid passport.
> — International vaccination certificate for smallpox and cholera.
> — Liberian licence valid for the rank to be served on board.
> — Panamanian certificate of competence valid for the rank to be served on board.
>
> The company shall reimburse the employee for the cost of certificates, photos taxes necessary to obtain the release or the renewal of the following documents and passport — vaccination certificate — Liberian licence — Panamanian certificate of competence.
>
> If an employee called for assignment on board does not have the above listed required documents, he cannot be enlisted and therefore he has no right to reimbursement of living expenses and of travel costs to and from his home. His position will be considered as unavailable for service. If after enlistment, for any cause, the employee is not able upon request because of his negligence, to show the Liberian licence or the panamanian certificate of competence which entitle him to serve in the rank for which he has been enrolled, the company has the right to consider him as dismissed because of his fault.

The last agreement of engagement which the plaintiff signed with the first defendant was dated 12 November 1981. In the agreement, the printed art VIII therein was cancelled and in its place was inserted a new art XIV which reads as follows:

> The company will arrange for coverage under Esso Singapore Pte Ltd's medical insurance plan. The company will pay for the total insurance premium payable to the insurance company for Plan EIC (Family Certificate). The employee shall comply with and be bound by the terms and conditions of the plan as may annuled from time to time except as to the employee's liability to contribute to the insurance premium.

I would state right away that I do not think the agreement of 12 November 1981 has any bearing on the issues in this action. It seems to me clear that the relevant contract was the one that applied in September 1980, when the plaintiff fell sick at Port Dickson. The evidence unequivocably shows that the disabilities, which the plaintiff now suffers, resulted directly from the event that occurred at Port Dickson in September 1980.

Although art VIII of the agreement of engagement dated 27 August 1980 prescribes that Esso would arrange for sickness and accident insurance providing for coverage similar to those applying to the private Italian merchant marine, this was not done. In fact for quite a long while the second defendant was not sure whether there was an insurance cover taken out for the plaintiff: see 1PB29, 1PB32, 1PB39 and 1DB61. It would appear that for the period 1 January 1975 to 30 June 1981, Esso was self-insured and assumed the risk itself. Mr Teddy Yap (DW2) has now so confirmed in court. The sort of insurance cover which applies to the private Italian merchant marine is set out in exh 'P1', a translation of it into English is found in 1BD9-26.

Medical evidence

Dr Pillay (PW1) testified for the plaintiff. His evidence in court basically amplified what he said in his medical reported dated 8 February 1982.

Dr Robert Don (PW2), a medical specialist in private practice dealing in the treatment of stroke patients, also gave evidence for the plaintiff. Based on the medical reports of Dr Thuraisingham of the Penang Medical Centre, Dr Yap, Dr Choo of the Jurong Hospital and Dr Catherine Ng (1PB1-8), Dr Don said that the plaintiff had serious multiple strokes. The plaintiff's brain, which has no regenerative power, is permanently damaged. In Dr Don's experience, most stroke patients'

memory improve with time but there will always be residual problems. There would be perceptual disorders and a person who suffers such a disorder will not appreciate distance and spatial circumstances. In his opinion the plaintiff is not fit to be a captain of a ship.

Of greater significance is the evidence of Dr Yap who told the court that he is now of the opinion that it is highly unlikely that the heart caused the emboli which choked up the brain of the plaintiff; instead he now feels that the plaintiff was suffering from virus encephalitis, a virus attack brought about by mosquito bites. Though in his clinical notes (exh 'P9') Dr Yap did refer to encephalitis, this was never mentioned in his medial reports. He said the residual disability of spasticity which the plaintiff now suffers is a general degeneration of the condition of September 1980. As Dr Yap was the specialist engaged by Esso to treat the plaintiff from the very start of his illness, his opinion must be given very great weight and which I accept. I would add that it was only when Dr Yap testified in court, or shortly before then, that the plaintiff learned that his condition could have been caused by virus encephalitis.

Governing law of contract

This is no real dispute between the parties as to the law that governs the agreement of engagement. The statement of claim does not say anything about it. The defence states that the governing law is that of Panama, the flag state. Mr Mazzochi is of the view that strictly Panamanian law governs the agreement. On the other hand, Mr Cavallari is of the opinion that Singapore law applies. Rather ironically, the plaintiff's counsel in his final submission said that the proper law of the contract is Italian law. Be that as it may, both parties are prepared to proceed as if Singapore law governs the contract of engagement. I may add that the defendants have not introduced any evidence on Panamanian law.

Claim in negligence

I will first deal with the claim based on negligence. In my mind there is no doubt that the second defendant, as the agent of the first defendant, had acted with less than reasonable care in sending the plaintiff on board Esso Tumasik without complying with the requirements imposed by Dr Yap and endorsed by Dr Catherine Ng, ie, there should be a first officer with a master's certificate or another captain to assist him and to observe how he functioned as a master. I have noted Mr Teddy Yap's (DW2) evidence that the recommendation was not practical. If that were indeed the reason I would have expected the second defendant to further consult Dr Yap to ascertain whether it was prudent to send the plaintiff back to sea at all. Dr Yap said he was never consulted on that. In fact he said he never saw the plaintiff again until 1987. Mr Teddy Yap was unable to produce any evidence of further consultation with the company's doctors.

Further, at that time, the plaintiff was also taking the drug Warfarin, which had the effect of thinning the blood. If the plaintiff should fall or have a cut, he could die from uncontrollable bleeding. Thus, Dr Yap said that he had suggested to the second defendant that the plaintiff should be asked to serve on board a vessel which ply within close proximity to Singapore so that if help were ever required he could be brought back to Singapore quickly.

While it seems clear to me that the defendants had acted with less than the requisite prudence in sending the plaintiff to command Esso Tumasik at Guam, thereby putting at risk the plaintiff's life and the safety of the vessel, fortunately nothing untoward happened on that voyage.

However, for a claim to succeed it must be shown that the negligence has caused damage or injury or further injury. In response to a specific question put by the court, Dr Yap said that sending the plaintiff back to sea where he encountered rough weather would not aggravate his medical condition. Stress could affect his judgment but not his physical state. According to Dr Yap, the spasticity which the plaintiff now suffers is the natural development from the event which occurred in September 1980 (1DB72). This is also very much the view of Dr Don, who stated that what happened between 1981 and 1982 was the gradual development of spasticity in the right upper and lower limbs of the plaintiff following the strokes suffered by the plaintiff in September 1980. It would have been quite a different matter if the plaintiff had received a cut and was then on board a vessel in distant waters and serious injuries were caused to him as a result. But, as I have said, fortunately nothing like that happened.

Another aspect of negligence alleged by the plaintiff is that he was not allowed to be hospitalized in Port Dickson but was instead required to take the vessel up to Penang. The doctor at Port Dickson who saw the plaintiff suggested that he be hospitalized, presumably to keep him under observation. The doctor did not make any diagnosis. But when the plaintiff spoke to Capt Arrivo the next morning, he did not inform the latter of what the doctor at Port Dickson suggested. Neither did he inform Capt Arrivo that he felt he was not fit enough to take the vessel up to Penang. In fact, he said he would try. I note the point made by the counsel for the plaintiff that the company must have realized the seriousness of the injury, otherwise they would not say that they would send a person to relieve the plaintiff at Penang. I think this fact of sending a relief to Penang is quite neutral. It could very well indicate a concerned employer. I agree that the plaintiff

himself did not know and could not have known what was actually wrong with himself. But in the circumstances, I would not be inclined to think that it was negligent of the second defendant to allow the plaintiff to take the vessel to Penang. In any event, there is no need for me to make a definitive finding on this point (and I make no such finding) as there is no evidence to suggest that the injuries suffered by the plaintiff were aggravated as a result of his taking the vessel from Port Dickson to Penang. All the more so when the court is now informed by Dr Yap that the injuries were more probably due to virus encephalitis.

Accordingly, the claim based on negligence must fail. For completeness I may add that the plaintiff's counsel has also made a number of other allegations of negligence against the defendants. But they do not alter the basic conclusion I have reached on this aspect of the claim.

Claim based on contract

I turn next to consider the claim based on art VIII of the agreement of engagement. The first issue I have to decide is: what are the insurance benefits which apply to private merchant marine in Italy and which are incorporated into the contract by virtue of art VIII? In my judgment what is incorporated by Art VIII is not just the insurance law for seamen in Italy. That would be the minimum. It is the insurance scheme normally applicable to the Italian merchant marine, which could well be above the minimum prescribed by law. To assist the court, the parties have called attorney Egisto Cavallari (PW4) and attorney Maurizio Mazzochi (DW1). Both experts, who specialize in maritime law, agree that Decree No 1124 of 30 June 1965 is one such law which would be incorporated by art VIII. This decree requires an employer to take out insurance for each employee (including a seaman) against injuries sustained on the job and occupational illnesses.

What they disagree on relates to ss 2043 and 2087 of the Italian Civil Code. Section 2043 (a translation into English is in exh 'P6') provides that:

> whatever fact, fraudulent or negligent, which causes to other parties a damage, compells the one who has committed such an act to reimburse damage.

Section 2087 (a translation into English is in exh 'P7') provides that:

> the employers are compelled to adopt all necessary means according to the specific requirements of the type of employment and experience which are necessary to ensure the physical existence and well-being of the employees and their moral dignity.

An action based on these two provisions is in Italy known as 'danno biologico'. Mr Cavallari is of the view that these two provisions relate to insurance law and are incorporated by art VIII. Mr Mazzochi thinks otherwise. Here, I accept the opinion of Mr Mazzochi that these two provisions have nothing to do with insurance. It seems to me clear that s 2043 provides for what is the equivalent of civil liability for torts (due to negligence or deliberate wrong doing); and s 2087 requires an employer to provide a safe system/place of work for his employees. Even Mr Cavallari has to concede that a claim under s 2043 is not in contract but in tort.

The parties are in agreement that the illness and accident scheme set out in exh 'P1' is the scheme which was applicable to the plaintiff when he suffered the injuries in September 1980. It covers, and here Mr Mazzochi agrees, more than what is required of Esso under Decree No 1124. Clauses B(3) and B(4) of 'P1' (as translated in 1DB18) read as follows:

> (3) In the case of permanent, total disability due to injury sustained on the job or some occupational illness:
> The seaman must supply the Company with suitable medical certificates, which will be passed on to the insurance company. The latter must follow up with adequate checks. Subsequently, the insurance company will compensate the seaman to the tune of the sum of 6 years' salaries.
>
> (4) In the case of permanent, total disability due to injury sustained during vacation leave, or while awaiting embarcation:
> — The compensation due the seaman, and the documents he must produce are the same as those indicated in paragraph 3. This is as long as the circumstances are covered by the Company's Group Accident Insurance Policy, which includes those risks which in Italy, are normally covered by a Group Policy for accidents occurring outside of the place of work.

I must emphasize that these two clauses are not clauses in an insurance policy but just broad statements of the scheme of things for the benefit of seamen like the plaintiff. Clause B(3) broadly covers injury sustained on the job and cl B(4) covers injury sustained on leave or prior to embarkation. Both the Italian law experts disagree on what would strictly in Italian law constitute injury sustained on the job; they also disagree on what is occupational illness within cl B(3). Mr Cavallari is of the view that a heart attack would fall within both concepts. He even disagrees with the definition of occupational illness promulgated by the authority in Italy which is in charge of merchant marine and deals with seamen's claims, Cassa Marittima Tirrena (CMT). CMT defines occupational illnesses as illnesses (at 3DB 44-45):

> which are caught during the enlistment and directly caused by the carriage, working and handling of matters and substances which for their particular feature may cause these illnesses.

I accept this definition of CMT, which is in line with the common understanding of the term 'occupational illness'. To qualify as such, it must be shown that the illness is peculiar to the job. There is no evidence presented to me to show how a heart attack is in any way

peculiar to the job of a seaman. There is no evidence of any such special linkage.

As regards 'injury sustained on the job' within the meaning of Decree No 1124, both the Italian experts agree that to constitute such an injury there must be some external violent cause. But they disagree on what constitutes external violent cause. As stated above, Mr Cavallari is of the opinion that a heart attack per se is a violent cause. On the other hand, Mr Mazzochi has produced Italian case law to support his view that a heart attack per se cannot be an injury sustained on the job because there is no violent cause in a heart attack as such. He said that violent cause is an 'event external to the worker capable of producing harmful effects with an intense action concentrating in a very short period of time'. To render a heart attack as an injury sustained on the job, something more by way of violent external force must be present which brings about the heart attack, eg a fall or being struck by an object. He cited *Lupi*'s case (at 3DB101) in support of his view.

For reasons which should have been apparent, the initial case of the plaintiff was that the injuries were caused by a heart attack. This was based on the earlier medical reports. However, as I have indicated above, when Dr Michael Yap was called by the plaintiff to testify in court he said that it is more probable that the injuries which the plaintiff suffered were caused by virus encephalitis, which was brought about by mosquito bites. This new element is significant in considering whether there was any violent cause in the context of the injuries which the plaintiff sustained.

The authorities cited by both experts are in some instances not easy to follow; and part of the reason is that the translation of the Italian text does not come out quite so clearly. The following reports appear interesting and relevant:

> in this case the court admitted as injury on the job the death of the worker who, already suffering from arteriosclerosis and hypertension, had got such an emotional stress in consequence of a dispute with his superior as to cause him a mortal outcome about an hour later (at 3DB55).

> In order to qualify a damaging event as violent cause of an injury on the job, pursuant to ... N1124, it is necessary and, at the same time, sufficient for this event to damage the worker's organism, acting ab extrinseco through a determined and quick action, while the requirements of extraordinariness, casualness or unexpectedness of the damaging fact are not essential as, being not referred to in the law provisions, they are pure occasional aspect of them, not characterizing, although frequent or even usual ... (at 3DB51).

> The violent cause, provided by art 2, N.1124 as a genetic fact of the injury on the job covered by the relevant insurance is a determined, quick and intense action which caused injuries to the workers' organism. (at 3DB53)

Exhibit 'P13' contains a translation in English of a treatise on social security written by one Beneditto Bussi. The following statement in 'P13' dealing with microbial causes is, I think, pertinent:

> A violent cause is not a violent occurrence which causes an injury, but an occurrence which is a violent cause of injury, which means, at the commencement of the insurance, implied that the defeat of the interpretation which was designed to restrict the accident insurance only to traumatic violent causes. For the case in question, therefore, it is absolutely irrelevant that the way of penetration of the pathologic germs into the human body, since the violent cause is only the biological power which penetrated into the body. Most typical cases are tetanus ... virus hepatitis.

Another publication, exh 'P14' (a collection of court cases), as translated, reads as follows:

> The onset of a seaman's pneumococcus meningitis who is working in a tropical climate, can indeed be considered as an accident at work, since we have to consider the specific climatic conditions as a violent cause and the circumstance to be at work as the necessity to be exposed to the tropical climate. Environmental conditions, known to everybody, in the case in question, don't require to be specifically proved, the same can be said for the scientific knowledge.

Lupi's case (see 3DB148) which is very much relied upon by the first defendant has a few distinguishing features. There Lupi had been suffering for a long time from 'arterioschlerosis and obliterative arterioscopy of the lower extremities'. The court found that he died in his cabin from natural causes and that he did not die from an injury sustained on the job. There was an allegation that Lupi suffered great stress for two days prior to his death because of foul weather. But his death only occurred 18 hours after the storm had subsided.

Mr Mazzochi agrees that a mosquito bite might be sufficient to constitute the external force. He has told this court that 'violent cause can consist of virus'. I think that must be so. But he has further explained (when shown 'P14') that for an injury or disability which is caused by a mosquito bite to fall within the ambit of injury sustained on the job 'there must be a specific risk of the [plaintiff by virtue of the] job being exposed to mosquito bites, not a risk which everyone is exposed'. He is of the view that a mosquito bite is not per se connected with or related to the job. It may happen to any person outside the job.

On the other hand, Mr Cavallari says that, 'violent cause is the biological power which penetrates into the body — it does not matter whether it is a log of wood or a mosquito ... Any virus action is violent cause ... ' He also says that whatever injury a seaman sustains on board a ship, that injury is sustained on the job. This is because a seaman is on the job 24 hours, starting from the moment a voyage commences. Even specific climatic conditions may be considered as a 'violent cause'.

In short, while Mr Mazzochi agrees that a mosquito bite could constitute the external force, he is saying that is not all. There must be an added factor: that the job as such exposed the plaintiff to the specific risk of being

bitten by mosquitoes, like going to a mosquitoes infested area. Turning to Mr Cavallari's argument I see it is attractive up to a point. He says a seaman goes wherever the vessel takes him. A seaman is exposed to all kinds of environment with diverse risk, some known and some unknown. That may be so. But there is no evidence that the plaintiff had gone to a mosquitoes infested area, exposing him to some peculiar risks which the plaintiff would not otherwise be exposed. Otherwise there would be nothing to link the injury with the job.

I am inclined to accept Mr Mazzochi's view that it has not been shown that the plaintiff's injuries were sustained on the job within the meaning of Decree No 1124. But that does not conclude the matter. There is still the scheme under 'P1' to consider. Clause B(3) in 'P1' should be read together with cl B(4). They are complementary. If one were to take the narrow view in considering cl B(3), then it would mean that the mosquito bites (and the consequential injuries) sustained by the plaintiff were not injuries sustained on the job and thus did not fall within that clause; yet if the same mosquito bites were shown to have been sustained by the plaintiff before embarkation, then his claim would (subject to what I am going to say on the proviso to cl B(4) in the next paragraph) fall within cl B(4) and he would be entitled to the compensation provided therein. To take another example. A seaman was standing on the top deck while the ship was at the dock. A naughty boy threw a metal piece at him and struck him on the head, causing a fatal injury. Certainly, that injury had nothing to do with his work as a seaman. Yet if he were on leave and standing at the wharf and a similar injury should be sustained by him, he would be covered by cl B(4). Such a result would not be in consonant with good sense. It seems perverse. Considering the essential nature of such an illness and accident scheme as in 'P1', I do not see any logic why an injury sustained by a seaman on leave should be covered and yet the same injury if sustained while he was at work would not be covered. I would have thought that the rationale for covering such an injury sustained while at work is even stronger. In this regard, I recall the evidence of Mr Mazzochi who said that the benefits set out in 'P1' are better than those required to be provided under Italian law. Quite clearly the scheme of things provided under 'P1' stands on its own as it has gone well beyond the basic requirements of Italian law. An interpretation based exclusively on Decree No 1124 is not conclusive as to the scope of 'P1'. Decree No 1124 is the equivalent of our workmen's compensation. I would reiterate that art VIII of the agreement of engagement does not incorporate just the Italian insurance law for seamen. It incorporates the sickness and accident insurance scheme which normally applies to the private Italian merchant marine. As the court now understands it, 'P1' is the sort of insurance scheme that applies. So even if under the strict Italian law of Decree No 1124, the injuries suffered by the plaintiff could not be considered to be sustained on the job, I would hold that they are covered by 'P1', either under cl B(3) or B(4). There is no evidence before me to show whether the plaintiff was bitten before or after he embarked on Esso Chawan on 27 August 1980. All we know is that encephalitis has an incubation period of 4 to 21 days (see exh 'P10'). Since the benefits under cl B(3) and B(4) are the same, it makes no difference. Otherwise I might have to consider recalling the parties to establish, if possible, the more likely period when the plaintiff was bitten by the mosquitoes.

There is one other aspect in relation to cl B(4) which I must address as it has a direct bearing to the reasoning in the immediately preceding paragraph. It concerns the proviso to cl B(4). The proviso reads:

> This is as long as the circumstances are covered by the company's group accident insurance policy, which includes those risks which in Italy, are normally covered by a group policy for accidents occurring outside of the place of work.

Esso has not produced any company's group accident insurance policy to show the scope of its coverage. Esso had not taken out any policy to cover the plaintiff even though art VIII and cl B(3) and B(4) of 'P1' clearly contemplate the taking out of such a policy or group policy. By default Esso became self-insured. In the absence of such a group policy, I am inclined to think that there is no scope for the proviso to apply. Even if I were wrong to take that view, then in the context of cl B(4) it is for Esso to show that the injuries suffered by the plaintiff fall outside those risks which in Italy are 'normally covered by a group policy for accidents occurring outside the place of work'. They have not produced any group policy, whether of their own or of any other shipowners/employers, to illustrate what is the norm. Esso should not benefit from its own default in not taking out a policy or group policy. On the other hand, there is evidence from Mr Cavallari (NE 98) who says that big companies in Italy do take up insurance cover for their top executives even for heart conditions, which is above their legal obligations. Mr Cavallari has also referred to a collective agreement which provides that if a ship is over 3,000 tonnes, the coverage would extend to more risks and the amount insured would be greater. It is pertinent to note that under cl A(4) of 'P1' (see 1DB17) compensation is even paid for illness caused by venereal disease. And when it is intended to exclude a specific illness or injury, 'P1' is also explicit: see cl A(5) on illness caused by alcoholic abuse. Indeed Mr Mazzochi has conceded that 'P1' covers ordinary illness.

In the light of the above, I find that the injuries suffered by the plaintiff come within either cl B(3) or cl B(4) of 'P1' and he is entitled to the compensation prescribed therein.

Quantum of damages

I now come to the question of quantum. The plaintiff claims damages under three heads:

(i) insurance benefits under art VIII of the agreement of engagement;
(ii) damages under s 2087; and
(iii) retrenchment benefits — one month for each year of service, plus an additional five months under exh 'P15'.

For the reasons which I have given above, the claim based upon s 2087 cannot succeed. As regards retrenchment benefits, Esso does not dispute that the plaintiff is entitled to 13 months' pay for 13 years' service. This amounts to 30,365,114 lires (2,335,778 lires × 13). 'P15' is a 'Collective National Work Agreement for Master Mariners in command of ships in Free Commission'. But the agreement was concluded on 30 October 1981, well after the event which is the subject of this action. Accordingly, the benefits provided thereunder can have no application to the present claim.

There is, however, a difference of view between Mr Cavallari and Mr Mazzochi as to the amount payable under the insurance claim. Exhibit 'P8' sets out the calculation of Mr Cavallari. The calculation of Mr Mazzochi is to be found in 3DB163. Mr Cavallari's calculation is as follows:

2,335,778 × 12 = 28,029,336 lires

1 Amount payable to Capt Pancini
28,029,336 × 9.899 = 227,462,397 lires
(multiplier of Cassa Marittima)

2 Amount payable in respect of Mrs Pancini
$\frac{28,029,336 \times 9.655}{20}$ = 13,531,161.95 lires
(division of Cassa Marittima)

3 Amount payable in respect of Capt Pancini's son
$\frac{28,029,336 \times 6.05}{20}$ = 8,478,874.14 lires
(division of Cassa Marittima)

Total : 299,472,433 lires

Mr Mazzochi's calculation is as follows:

maximum conventional annual wages:	11,549,000
injured 40 years	10,616
time elapsed 0	+ 0,458
	= 11,074
11,549,000 × 11,074 =	127,893,626
wife 40 years	9,454
time elapsed 0	+ 0.458
	= 9,912
$11,549,000 \times \frac{1}{20} \times 9,912 =$	5,723,684
son 8 years	5,008
time elapsed 0	+ 0,15
	= 5,158
$11,549,000 \times \frac{1}{20} \times 5,158 =$	2,978.487
	= 136,595,797

At this junction, I would observe that while cl B(3) and B(4) specify that the compensation payable shall be six years' salaries, the manner is which both Mr Cavallari and Mr Mazzochi have worked out the claim shows something quite different from a simple calculation of the monthly wages multiply by 72 months. The method used by them has three components, ie for the plaintiff himself, his wife and his son. According to Mr Mazzochi, CMT will pay whichever is more favourable to the seaman, ie either a straight six-year calculation or based on this special formula (NE 112).

It will be noted that the most significant difference between the two calculations relates to the annual wages. Whereas Mr Cavallari used the actual monthly wages multiplied by 12 to obtain the annual wages of the plaintiff at 28,029,336 lires, Mr Mazzochi adopted the maximum conventional annual wages of 11,549,000 lires. Mr Cavallari agreed (at NE 85) that Italian law does provide for maximum conventional wages but explained that taking into account the exchange rate it would work out to about the same figure. Mr Cavallari also said that the figure 11,549,000 lires represents the minimum and not the maximum annual wages. Mr Mazzochi produced to court a ministerial decree issued on 3 July 1980 (exh 'D4') to show that for senior marine officers the maximum limit is 11,549,000 lires. In so far as the multipliers are concerned, those adopted by Mr Mazzochi are generally more favourable to the plaintiff. The ironical thing about both these two calculations is that though they are different, they have both been approved by senior staff of CMT as being correct!

Be that as it may, I find that the calculation adopted by Mr Mazzochi in 3DB163 is more likely to be correct, particularly having regard to exh 'D4'. I accept that 136,595,797 lires is the correct sum. But there is a further aspect to this question. As a straight calculation of six years' wages amount to 168,176,016 lires, which is more than 136,595,797 lires, I hold that the sum due to the plaintiff is 168,176,016 lires, being the more favourable of the two. This will also be in accord with what is provided in cl B(3) and B(4).

There is one other point of dispute between Mr Cavallari and Mr Mazzochi. Whereas the former is of the opinion that the compensation payable should be 100% the latter thinks it should be 40% only. This difference arises because in term of a whole person, both parties agree that the disability which the plaintiff now suffers amounts to only 40%. But what Mr Cavallari contends is that in so far as being a seaman is concerned, the disability which the plaintiff now suffers is 100%; he will never be able to be a seaman again. I accept Mr Cavallari's views as being correct. We are here concerned with an insurance scheme for the benefits of a seaman. And if he can never be a seaman again,

the disability, in so far as that vocation is concerned, must be 100%.

Miscellaneous issues

There remain two other issues which I must address. First, does art XIII impose an obligation on the employer to ensure that the plaintiff undergo his bi-annual check in Italy. Mr Mazzochi expresses the opinion that art VIII does not impose any obligation on the shipowners. Instead, that provision imposes an obligation on the employee to have the bi-annual check done and entitles the employer, if this is not complied with by the employee, to refuse his enlistment and not to reimburse the travel costs incurred by the employee to reach the port of embarkation. However, Mr Cavallari contends that there is a duty on both the shipowner and employee to obtain the bi-annual clearance. In my judgment, this issues involves a pure question of construction of art XIII. I do not think that the article, which is to be construed according to Singapore law, could reasonably be read to mean that the contract has incorporated all the Italian laws relating to the bi-annual check. All it means is that without the bi-annual check, the employer has a discretion not to engage the seaman. In the context of the present case, I accept the plaintiff's contention that being a career master, he could not just leave his station on his own to go for the bi-annual check without first obtaining permission (and perhaps the necessary air passage) from the defendants. By not granting permission or providing the air passage, Esso had in effect waived the need for bi-annual check. In any event, the question of bi-annual check is really quite immaterial for the present proceedings for two reasons. First, in September 1980, Esso was effectively self-insured. We are not here concerned with a cover administered by the CMT, though it is recognized that the CMT would not have covered a seaman who did not have a current bi-annual check endorsed on his seaman's book. Second, the injuries suffered by the plaintiff in September 1980 were not due to any inherent disease of the plaintiff which could have been detected on a bi-annual check. We have now heard from Dr Yap that the injuries were caused by virus encephalitis, brought about by mosquito bites.

The second question is whether the plaintiff is right to have sued the second defendant; was there a contractual relationship between the plaintiff and the second defendant. Initially the plaintiff sued only the second defendant. But in the light of the defence filed by the second defendant, the first defendant was added as a party. From the various agreements of engagement, it is quite clear that at all times the second defendant was acting as an agent for the first defendant. It is true that throughout the entire period the plaintiff was dealing directly with the second defendant. It was the second defendant's fleet evaluation committee that promoted him to be a career master. But the fact remains that the second defendant had at all material times acted as agent and manager of the first defendant in all these matters. The fact that under their mutual arrangements, the first defendant had accorded wide discretion to the second defendant in the recruitment and management of staff on board its vessels did not render the second defendant any less an agent. I am conscious of the reasons the plaintiff is contending so strenuously that his contractual relationship was with the second defendant. The plaintiff is concerned that there might be difficulties in enforcing this judgment against the first defendant, a company incorporated outside Singapore. Indeed, during the course of the hearing of this case, the identity of the first defendant has changed. It was previously Esso Eastern Marine Ltd incorporated in Bermuda. Now that is replaced by Esso International Shipping (Bahamas) Co Ltd. I do not believe that a multinational of the stature of Esso (and here I am using Esso in the widest sense as a group) would, under the guise of corporate structure, deny the plaintiff his just due under this judgment. I am confident that this concern is misplaced. I accordingly find that the person liable to the plaintiff is the first defendant and not the second defendant.

In the result, I order that judgment be entered against the first defendant in the total sum of 198,541,130 lires, made up of 168,176,016 lires in respect of the insurance claim and 30,365,114 lires in respect of retrenchment benefits, with interest to be calculated at 6% from 10 June 1982, the date the writ was issued. Counsel for the plaintiff urged upon me to convert the sum due to the plaintiff into Singapore dollars at the rate of exchange prevailing in 1982. As is well known, exchange rates fluctuate. They could go up; they could also come down. In the present case, I appreciate that the Singapore Dollar has in the intervening years strengthened vis-a-vis the Italian lires. But I think it is only fair that the risk of exchange rate fluctuation be borne by the parties. The claim against the second defendant is accordingly dismissed. I will now hear the parties on costs.

Claim against first defendant allowed.

Solicitors: *Nathan Isaac & Co; Tan Rajah & Cheah.*

Reported by *Yap Shao Sin*